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No. 07-539

IN THE
Supreme Court of the United States

PROGRESS ENERGY, INC.,

Petitioner,

v.

BARBARA TAYLOR,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Fourth Circuit correctly concluded that the plain language of 29 C.F.R. § 825.220(d), which provides that "[e]mployees cannot waive, nor may employers induce employees to waive, their rights under FMLA," precludes the unsupervised waiver of all FMLA rights, including substantive, proscriptive and remedial rights, and that the Department of Labor's recent interpretation is inconsistent with the regulation.

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STATEMENT OF THE CASE

1. **The Statutory and Regulatory Scheme.** Congress enacted the Family and Medical Leave Act of 1993 ("FMLA"), 107 Stat. 6, 29 U.S.C. § 2601 *et seq.* in response to growing concerns about "inadequate job security for employees who have serious health conditions that prevent them from working for temporary periods." 29 U.S.C. § 2601(a)(4); *see* S. Rep. No. 103-3, at 11-12, reprinted in 1993 U.S.C.C.A.N. 3, 13-14 (noting that "job loss because of illness has a particularly devastating effect on workers who support themselves and on families where two incomes are necessary to make ends meet or where a single parent heads the household"). Indeed, it is an express purpose of the statute to "entitle employees to take reasonable leave for medical reasons . . . in a manner that accommodates the legitimate interests of employers." 29 U.S.C. § 2601(b)(2)-(3); *see also Hukill v. Auto Care, Inc.*, 192 F.3d 437, 441 (4th Cir. 1999) (describing the purpose of the FMLA to "balance the demands of the workplace with the needs of employees to take leave for eligible medical conditions and compelling family reasons."), *cert. denied*, 529 U.S. 1116 (2000).

The FMLA provides three categories of rights. The substantive rights include an employee's right to receive up to twelve weeks of unpaid leave for a serious health condition, 29 U.S.C. § 2612(a)(1), and the right to reinstatement following the leave, *id.* § 2614(a)(1). Other substantive rights include the continuation of employment benefits, *id.* § 2614(a)(2), the maintenance of the employee's group health coverage, *id.* § 2614(c)(1), and the

availability of intermittent leave, *id.* § 2612(b)(1). Additionally, "employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions; nor can FMLA leave be counted under 'no fault' attendance policies." 29 C.F.R. § 825.220(c).

The proscriptive rights include an employee's right not to be discriminated against or retaliated against for exercising FMLA rights. *Id.* § 2615(a)(2); *see Morgan v. Hilti*, 108 F.3d 1319, 1325 (10th Cir. 1997).

The FMLA also provides employees with a third category of rights, a private right of action to recover both equitable relief and money damages against an employer who interferes with an employee's exercise of any rights under the Act, or discriminates or retaliates against an employee's exercise of any rights under the Act. 29 U.S.C. § 2615(a)(1), (2); § 2617(a)(1), (2); *see Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 724 (2003).

2. **Factual Background.** Respondent Barbara Taylor was hired by CP&L, Petitioner's wholly owned subsidiary, as a document management technical aide in 1993. Pet. App. 23a. In April 2000, Mrs. Taylor began experiencing extreme pain and swelling in her right leg. *Id.* Mrs. Taylor's doctor took her out of work for five (5) consecutive days due to increasing pain and swelling. *Id.* Mrs. Taylor's doctor informed her that she needed to undergo a number of medical tests in an effort to determine the cause of the pain and swelling in her leg. *Id.*

When Mrs. Taylor returned to work she went to CP&L's human resources department to inquire about leave options available to her as a result of her medical problems. *Id.* The human resource representative told her that she did not qualify for FMLA leave. *Id.*

During the months of June and July, Mrs. Taylor was out of work a number of days for medical testing and treatment, including a heart test. *Id.* When Mrs. Taylor inquired about FMLA leave a second time, she was again told that she did not qualify. *Id.*

In August 2000, Mrs. Taylor underwent another procedure for the purpose of determining the cause of the extreme pain and swelling in her leg. *Id.* As a result of complications with the procedure, Mrs. Taylor was out of work for five (5) consecutive days and several additional days during the weeks following the procedure. *Id.* In October 2000, Mrs. Taylor received a written warning from her supervisor and the human resource representative stating that she had exceeded the company's average sick time. *Id.* at 23a-24a. When Mrs. Taylor asked about options for handling her health-related absences she was told that she needed to improve her attendance. *Id.* at 24a.

In November 2000, Mrs. Taylor underwent additional medical tests that kept her out of work for five (5) consecutive days. *Id.* During this testing her doctor determined that an abdominal mass was causing the pain and swelling in her leg. *Id.* Her doctor told her that she needed to have the mass removed as soon as possible. *Id.* When Mrs. Taylor returned to work she informed the human resource

representative of her test results. *Id.* When Mrs. Taylor asked if her leave qualified as FMLA leave, Mrs. Taylor was again told that this leave did not qualify as FMLA leave because she had not been out for more than five (5) consecutive days. *Id.*

In December 2000, Mrs. Taylor had surgery to remove the abdominal mass. *Id.* Mrs. Taylor was out of work for approximately six weeks and was told that her leave qualified as FMLA leave and would be designated as such. *Id.* Mrs. Taylor discovered later that only four (4) of the six (6) weeks of leave were designated as FMLA leave. *Id.*

In February 2001, Mrs. Taylor received her 2000 performance evaluation. *Id.* She received a poor productivity evaluation because of her health-related absences. *Id.* Mrs. Taylor was also told by her supervisor that because of her health-related absences she would be receiving only a one percent salary increase, while the average raise given was six percent. *Id.*

In March 2001, Mrs. Taylor learned that the company planned to lay off some employees and that workers would be selected based in part on performance. *Id.* Concerned that her 2000 performance review included a poor productivity evaluation because of her health-related absences, Mrs. Taylor contacted the U.S. Department of Labor ("DOL"). *Id.* She was told that all of her health-related medical leave in 2000 could have qualified for leave under the FMLA. *Id.* Mrs. Taylor was also told that FMLA qualified leave cannot be counted against an employee in performance evaluations and in raise determinations. *Id.* at 24a-25a.

After speaking with the DOL representative, Mrs. Taylor, in an effort to save her job, asked human resources on several occasions to correct her 2000 performance evaluation. *Id.* at 25a. Her request was denied. *Id.* Less than two weeks later, in May 2001, Mrs. Taylor was told that her employment was being terminated. *Id.*

After being informed that she was losing her job of more than eight years, Mrs. Taylor was advised by CP&L that she could receive $11,718 in transition pay[1] if she signed a general release, which stated in part that "EMPLOYEE HEREBY RELEASES [Petitioner and its affiliates] . . . FROM ALL CLAIMS AND WAIVES ALL RIGHTS . . . ." Pet. App. 25a-26a. (emphasis in original). While the general release identified specific laws Mrs. Taylor would be waiving her rights to enforce, the release did not state nor was Mrs. Taylor informed that she was waiving her right to pursue a claim under the FMLA, Pet. App. 49a-50a, despite the fact that CP&L was aware of Mrs. Taylor's belief that it had violated the FMLA with respect to Mrs. Taylor's health-related absences, Pet. App. 25a. Finding herself without employment, Mrs. Taylor signed the release. *Id.*

Following her termination, Mrs. Taylor again contacted the U.S. Department of Labor concerning CP&L's failure to designate all of her health-

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[1] In calculating Mrs. Taylor's transition pay, CP&L used Mrs. Taylor's salary which reflected a one percent, instead of a six percent, increase because CP&L used Mrs. Taylor's health-related absences against her in determining her raise amount. *See* Pet App. 24a-25a.

related absences as FMLA leave. Pet. App. 26a-27a. Mrs. Taylor was informed that she could attempt to resolve the matter directly with CP&L. *Id.* Mrs. Taylor contacted the director of the human resource department to discuss the matter. *Id.* at 27a. The director corrected Mrs. Taylor's 2000 evaluation by removing the low productivity evaluation, but failed to reinstate Mrs. Taylor, adjust her raise, or even adjust her severance payment, which was based on Mrs. Taylor's improperly determined salary. *Id.*

3. **Legal Proceedings Below.** After CP&L failed to address Mrs. Taylor's concerns about her raise, salary and severance payment, Mrs. Taylor filed a complaint against Petitioner based on its subsidiary's many alleged FMLA violations including, *inter alia*, CP&L (1) failing to fully inform Mrs. Taylor of her rights and obligations under the FMLA; (2) improperly denying Mrs. Taylor's request for FMLA leave; (3) failing to designate Mrs. Taylor's health-related absences as FMLA leave; (4) selecting Mrs. Taylor for termination based on her FMLA-qualifying medical absences; and (5) selecting Mrs. Taylor for termination in retaliation for Mrs. Taylor complaining about CP&L's violations of the FMLA. Pet. App. 27a. Petitioner filed an Answer and a Motion for Summary Judgment. *Id.* In its Motion for Summary Judgment, Progress argued that Mrs. Taylor was barred from filing this action because Mrs. Taylor signed a general release on June 4, 2001. *Id.* In response, Mrs. Taylor argued, *inter alia*, that the FMLA rights which Mrs. Taylor was seeking to enforce cannot be waived or released pursuant to 29 C.F.R. § 825.220(d). *Id.*

The trial court, adopting the reasoning of the Fifth Circuit decision *Faris v. Williams WPC-1, Inc.*, 332 F.3d 316 (5th Cir. 2003), held that section 825.220(d) only bars the prospective (future) waiver of substantive rights and not the retrospective (after the fact) release of claims. Pet. App. 53a-65a. As a result, the district court granted Progress's Motion for Summary Judgment concluding that Section 825.220(d) did not invalidate the release and the release was not otherwise invalid. *Id.*

On appeal to the Fourth Circuit Court of Appeals, the court unanimously reversed the district court, holding that the release signed by Mrs. Taylor was not enforceable with regard to her FMLA claims because the plain language of the regulation, section 825.220(d), prohibits both the prospective and retrospective waiver of FMLA rights and claims unless the waiver is approved by the DOL or a court. Pet. App. 28a-44a.

The Fourth Circuit granted the employer's petition for rehearing and allowed the DOL to file an *Amicus* brief and present oral arguments in support of the employer's position that section 825.220(d) only prohibits the prospective, but not the retrospective, waiver of rights. Pet. App. 3a.

On rehearing, a divided panel rejected the DOL's interpretation of the regulation and again held that the regulation prohibits both the prospective and retrospective waiver of FMLA rights "including the right of action (or claim) for a past violation of the Act." Pet. App. 3a-20a.

The Fourth Circuit denied Progress's Petition for Rehearing *En Banc* on August 24, 2007, and

denied its Motion to Stay the Mandate on September 6, 2007.

REASONS FOR DENYING THE WRIT

I. The Case Law Addressing the Key Issues Present in this Case is Sparse and Undeveloped.

Section 825.220(d) provides that "[e]mployees cannot waive, nor may employers induce employees to waive, their rights under FMLA." Besides the Fourth Circuit, only one other court of appeals, the Fifth Circuit, has interpreted this provision. *See Faris v. Williams WPC-I, Inc.*, 332 F.3d 316 (5th Cir. 2003). *Faris* involved an employee who alleged she was terminated in retaliation for asserting her FMLA rights. Prior to filing her lawsuit, Faris had signed a release, which did not specifically mention the FMLA, but provided that Faris was waiving her rights to "all other claims arising under any federal, state or local law or regulation." *Faris*, 332 F.3d at 318. Thus, the only issue to be resolved by the Fifth Circuit was whether section 825.220(d) prohibits the waiver of an employee's right to bring a retaliation claim pursuant to 29 U.S.C. § 2615(a)(2). *Id.* at 320-21.

In addressing this single issue, the Fifth Circuit distinguished FMLA substantive rights and FMLA proscriptive rights (which include the right to be free from retaliation), and concluded that the phrase "rights under FMLA" as used in section 825.220(d) was in reference to the substantive FMLA rights only, and did not incorporate proscriptive or retaliation rights. *Id.* Based on this conclusion, the Fifth Circuit held the regulation did

not prohibit Faris's waiver of her proscriptive rights, and thus the release signed by Faris barred her from bringing her retaliation claim.[2] *Id.*

While the present case includes a claim of retaliation, the majority of Mrs. Taylor's claims are based on violation of Mrs. Taylor's *substantive* rights:

- Mrs. Taylor's right to be fully inform of her rights and obligations under the FMLA, 29 U.S.C. § 2615(a)(1);
- Mrs. Taylor's right not to have her FMLA-qualifying leave request improperly denied, 29 U.S.C. § 2612(b)(1);
- Mrs. Taylor's right not to have her FMLA-qualifying leave counted against her in raise determinations, 29 C.F.R. § 825.220(c);
- Mrs. Taylor's right not to be fired based on a poor productivity rating which was based on FMLA-qualifying, 29 C.F.R. § 825.220(c).

No other court of appeals has addressed section 825.220(d) in the context of the waiver of substantive rights, and an individual's right to bring an action under section 2615(a)(1) based on violation of a substantive right.[3] Additionally, no other court of

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[2] It bears noting that the DOL disagrees with the Fifth Circuit's conclusion that "rights under FMLA" as used in 825.220(d) is limited to only substantive rights. Pet. App. 7a.

[3] After making the substantive-retaliation distinction and stating that "[s]everal factors support the interpretation that this regulation applies only to waiver of *substantive rights* under the statute, such as rights to leave, reinstatement, etc., rather than to a cause of action for *retaliation* for the exercise

(*Footnote continued*)

appeals has reviewed DOL's interpretation of 825.220(d), as DOL first articulated its interpretation – that 825.220(d) prohibits only the prospective waiver of FMLA rights – in this action.

Consideration of the issues presented in this case by other court of appeals would provide more developed case law and make for a more meaningful review by this Court, if such review is deemed necessary.[4]

Contrary to the suggestion of Progress and its *Amici*, a decision by this Court to allowing the case law to develop in this area before addressing the issue, will not have a devastating effect on employers. Progress states that the court of appeals decision "saddles [DOL] and the federal courts with a new, judicially minted obligation to superintend potentially tens of thousands of private releases and settlements in FMLA cases each year . . . ." Pet. Br. at 8. However, Progress overstates the likely

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of those rights," *Faris*, 332 F.3d at 320, the Fifth Circuit concluded without clear explanation that section 825.220(d) prohibits only the *prospective* waiver of substantive rights. *Id.* at 321. However, that language is mere dictum because that issue was not before the court or the basis for the court's conclusion that the regulation did not prohibit the waiver of Faris' right to bring a retaliation claim.

[4] The DOL issued a Request for Information (RFI) on December 1, 2006, requesting information regarding, *inter alia*, employee's waiver of FMLA rights pursuant to 825.220(d), Request for Information on the Family and Medical Leave Act of 1993, 71 Fed.Reg. 69504, 69509-10 (Dec. 1, 2006), suggesting that the DOL may be preparing to take steps to formally amend the regulation.

increase of supervised FMLA settlements and the real impact of the Fourth Circuit's decision on employers.

In its supplemental brief filed during the Fourth Circuit review of this case, Progress acknowledged that

> when employers and employees enter into severance or settlement agreements, they rarely seek DOL approval of the release of [Fair Labor Standards Act] claims because the risk exposure from unreleased minimum wage and overtime compensation claims is limited and employers can identify those situations in which significant liability risks are present and limit their approval request to such situations.

Appellee C.A. Supplemental Br. 11

Like Fair Labor Standards Act ("FLSA") claims, employers are also able to identify those situations in which significant FMLA liability risks are present. Not every employee is eligible for FMLA. Not every eligible employee requires or seeks FMLA leave. Not every employee who seeks FMLA leave is denied the requested leave. Thus, employer should not have a difficult time identifying those situations where a risk of FMLA liability exists.

Moreover, the potential risk of a FMLA violation by an employer is *far less* then the potential risk of a FLSA violation. Indeed, the DOL's enforcement numbers bear this out. In fiscal year 2005, the Wage and Hour Division of the Department of Labor collected more than $166 million in back wages for 241,379 employees. 2005 Statistics Fact Sheet,

"Wage and Hour Collects $166 Million In back Wages for over 241,000 Employees in Fiscal Year 2005," http://www.dol.gov/esa/whd/statistics (July 30, 2006). Of those employees, more than 219,000 were employees with minimum wage and overtime back wage violations. *Id.* In contrast, only 1,626 of the 241,379 employees who received back wages had FMLA violation cases. *Id.*

While the number of overall investigations and back wages collected increased in the following year, the number of FMLA-related claims decreased. In fiscal year 2006, the Wage and Hour Division collected more than $171 million in back wages for 246,000 employees. 2006 Statistics Fact Sheet, "Wage and Hour Collects $172 Million in Back Wages for over 246,000 Employees in Fiscal Year 2006," http://www.dol.gov/esa/whd/statistics (December, 2006). Of those employees, more than 222,000 were employees with minimum wage and overtime back wage violations. *Id.* In contrast, only 1,200 of the 246,000 employees who received back wages had FMLA violation cases. *Id.* DOL noted that "[t]he number of [FMLA] complaint investigations concluded in fiscal year 2006 declined slightly from investigations concluded in fiscal year 2005. The number of violation cases declined by 19 percent from the number in fiscal year 2005, and over 26 percent fewer employees were affected by FMLA violations." *Id.*

Based on these enforcement numbers, employers have a *much greater* risk of violating the FLSA than violating FMLA. Additionally, despite the Petitioner's alleged egregious FMLA violations in this

case, DOL's enforcement numbers suggest that the majority of employers are complying with the FMLA and are not exposing themselves to increased risks of FMLA liability.

Because of the low risk of FMLA liability and the employers' ability to identify those situations where risk of liability exists, employers will continue to handle severance and settlement agreements as they have in the past, i.e., seeking DOL or court approval only in those *rare instances* where significant FLSA or FMLA liability exists.

Additionally, both the courts and the DOL are equipped to handle requests for approval when such approval is required because both entities have processes in place by which to supervise settlements of FMLA claims. With respect to the DOL, the Secretary supervises FMLA settlements in the same manner as the Secretary supervises settlements under the FLSA. 29 U.S.C. § 2617(b) (directing the DOL to resolve FMLA complaints in the same manner it resolves complaints under the FLSA – in accordance with 29 U.S.C. § 216).

Accordingly, DOL has the authority to resolve FMLA disputes and supervise binding settlements of FMLA claims and waivers of FMLA rights. With respect to the courts, where a FMLA case is pending before the court, the court may approve settlements in the same manner as it approves FLSA settlements.

II. The Court of Appeals Correctly Held that Section 825.220(d) Prohibits the Waiver of Respondent's FMLA Rights in this Case.

In a well-reasoned decision, the Fourth Circuit correctly held that section 825.220(d) prohibits the waiver of all of Respondent's FMLA rights (substantive, proscriptive, and remedial) and is not limited to only prospective waivers of these rights. Pet. App. 3a.

Looking to the plain language of the regulation, the court of appeals concluded that the phrase "rights under FMLA" includes no limitations regarding the specific rights under FMLA and includes no limitations regarding prospective or retrospective waivers. Pet. App. 4a-5a. Despite DOL's claim that section 220(d) only prohibits the *prospective* waiver of *substantive* and *proscriptive* rights, the regulation's plain language controls when a regulation is clear and unambiguous. *Christensen v. Harris County,* 529 U.S. 576, 588 (2000) ("To defer to the agency's position would be to permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation."). As the court of appeals correctly recognized, there is nothing in the plain language that limits the waiver prohibition to only prospective waivers. Pet. App. 7a-8a. Likewise, there is nothing in the plain language that would suggest that the phrase "rights under FMLA" does not include remedial rights – the right of action provided under section 2617(a)(2). Pet. App. 4a-5a.

Even assuming *arguendo* that the regulation is ambiguous, the Fourth Circuit correctly concluded

that DOL's proffered interpretation is inconsistent with the regulation and should therefore be rejected. Pet. App. 4a-8a, 10a-16a. DOL's interpretation, which in essence suggests that an employee's right of action is not included in the phrase "rights under FMLA" as used in the regulation, is inconsistent with the regulation which in no way limits the rights. This inconsistency is further underscored when the regulation is read in conjunction with the statutory provision it seeks to enforce, section 2615(a)(1), which states that it is "unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, *any right* provided under this subchapter." 29 U.S.C. § 2615(a)(1) (emphasis added).

The court also correctly concluded that DOL's current interpretation, articulated for the first time in its *Amicus* brief filed during the Fourth Circuit's review of this case, is inconsistent with the Department's position at the time the regulation was promulgated in 1995. *See* Pet. App. 13a-16a. As noted by the court in both of its decisions, *id.*, the DOL specifically considered and rejected a proposed amendments that would have excluded severance agreement waivers (generally retrospective waivers) from the waiver prohibition in section 220(d). *See* Preamble to the Final Regulations Implementing the Family and Medical Leave Act of 1993, 60 Fed. Reg. 2180, 2218 (Jan. 6, 1995). Rejecting the request to change the provision, the DOL explained that it had carefully considered the comments on section 220(d) and "concluded that prohibitions against employees waiving their rights and employers inducing employees to waive their rights

constitute sound public policy under the FMLA, as is also the case under other labor standards statutes such as the FLSA." *Id.* Now, more than a decade later, the DOL is saying it did not mean what it said.

Petitioner also argues that the court of appeals disregarded the policy favoring private resolution of disputes when it held that Mrs. Taylor did not waive her FMLA rights. While settlement may be favored in claims involving rights provided under employment statutes like Title VII and the Age Discrimination in Employment Act ("ADEA"), the FMLA is more analogous to the FLSA, and the Fourth Circuit appropriately looked to the FLSA for assistance in interpreting the FMLA waiver provision. *See* S. Rep. No. 103-3, at 35 (1993), reprinted in 1993 U.S.C.C.A.N. 3, 37 ("[The FMLA's] enforcement scheme is modeled on the enforcement scheme of the FLSA . . . . The relief provided in FMLA also parallels the provisions of the FLSA."); *see also Jordan v. U.S. Postal Service*, 379 F.3d 1196, 1201 (10th Cir. 2004) (looking to the FLSA for guidance in interpreting FMLA damages because of the similarity of the damages provisions); *Arban v. West Publ'g Corp.*, 345 F.3d 390, 407-08 (6th Cir. 2003) ("[T]his court previously has turned to the Fair Labor Standards Act (FLSA), which contains similar remedial provisions, for guidance in interpreting the FMLA."); *Smith v. Diffee Ford-Lincoln-Mercury, Inc.*, 298 F.3d 955, 968-69 (10th Cir. 2002) (interpreting FMLA cost provisions in the same way they are interpreted under the FLSA); *Frizzell v. Southwest Motor Freight*, 154 F.3d 641, 644 (6th Cir. 1998) ("Because the FMLA's

link to the remedial provisions of the FLSA is stronger than it is to Title VII . . ., we rely on case law under the FLSA rather than Title VII . . . .").

The FLSA was enacted for the purpose of protecting workers from substandard wages and oppressive working hours. *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728, (1981). Recognizing that there are often great inequalities in bargaining power between employers and employees, Congress made the FLSA's provisions mandatory. *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697 (1945). This Court concluded that based on the policy considerations that an individual employee's statutory entitlements under the FLSA, i.e., right to a minimum wage and to overtime pay, are not subject to negotiation or bargaining between employers and employees, *id.*, and cannot be abridged by contract or otherwise waived because this would "nullify the purposes of the statute and thwart the legislative policies it was designed to effectuate." *Barrentine*, 450 U.S. at 740 (internal quotation and citation omitted).

Similarly, the FMLA was enacted to set a minimum labor standard for family and medical leave in an effort to address "inadequate job security for employees who have serious health conditions that prevent them from working for temporary periods." 29 U.S.C. § 2601(a)(4). The FMLA "is based on the same principle as the child labor laws, the minimum wage, Social Security, the safety and health laws, the pension and welfare benefit laws, and other labor laws that establish

minimum standards for employment."[5] H.R. Rep. No. 103-8, pt. 1, at 21-22 (1993). Accordingly, the

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[5] The child labor laws, the minimum wage, Social Security, the safety and health laws, the pension and welfare benefit laws, and other labor laws that establish minimum standards for employment all

> arose in response to specific problems with broad implications. The minimum wage was enacted because of the societal interest in preventing the payment of exploitative wages. Children worked for long hours, under unsafe conditions, before the child labor laws were enacted. The Social Security Act was based on the belief that workers should be assured a minimum pension at retirement. The Occupational Safety and Health Act created standards to help assure safe and healthy workplaces.
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> *******
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> There is a common set of principles underlying these labor standards. In each instance, a Federal labor standard directly addressed a serious societal problem, such as the exploitation of child labor, or the exposure of workers to unsafe working conditions. Voluntary corrective actions on the part of employers had proven inadequate, with experience failing to substantiate the claim that, left alone, all employers would act responsibly. Finally, each law was enacted with the needs of employers in mind. Care was taken to establish standards that employers could meet.
>
> It is a minority of employers who act irresponsibly. Even without minimum standards most employers would pay a living wage, take steps to protect the health and safety of their work force, and offer their employees decent benefits. A central reason that labor standards are necessary is to relieve the competitive pressure placed on responsible employers by employers who act irresponsibly. Federal labor standards take broad societal concerns out of the competitive

(*Footnote continued*)

Fourth Circuit's conclusion that "[t]he reasons for the prohibition on private settlement of FLSA claims apply with equal force to FMLA claims," Pet. App 11a, was proper.

Congress's use of the phrase "waiver of rights" in the context of the FLSA supports the court of appeals conclusion that the regulation prohibits the waiver of all of Respondent's FMLA rights – substantive, proscriptive, and remedial – and is not limited to only prospective waivers of these rights. In FLSA section 216(c), Congress authorized DOL to

> supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees . . . , and the agreement of any employee to accept such payment shall upon payment in full constitute *a waiver by such employee of any right he may have under subsection (b)* of this section to such unpaid minimum wages or unpaid overtime compensation and

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process so that conscientious employers are not forced to compete with unscrupulous employers.

The FMLA was drafted with these principles in mind and fits squarely within the tradition of the labor standards laws that have preceded it. In the past, Congress has responded to changing economic realities by enacting labor standards that are now widely accepted. In drawing on this tradition, the FMLA proposes a minimum labor standard to address significant new developments in today's workplace.

H.R. Rep. No. 103-8, pt. 1, at 21-22 (1993).

an additional equal amount as liquidated damages.

29 U.S.C. § 216(c) (emphasis added). Subsection (b) cited in the above statutory language expressly includes a right of action.[6] *Id.* § 216(b). When Con-

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[6] Subsection (b) reads, in full:

(b) Damages; right of action; attorney's fees and costs; termination of right of action.

Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which (1) restraint is sought of any further delay in the payment of unpaid minimum

(Footnote continued)

gress added the waiver provision found in section 216(c) in 1949, it did so to encourage employers who had *already* violated employees' rights under the FLSA to voluntarily settle employees' claims under the supervision of the DOL. *See Sneed v. Sneed's Shipbuilding, Inc.*, 545 F.2d 537, 539 (5th Cir. 1977). Thus, when Congress states in section 216(c) that acceptance of the settlement by an employee constitutes "a waiver . . . of any right . . . under [the FLSA]," Congress is referring to the *retrospective* waiver of rights and also referring to an employee's waiver of their *right to file an action.* Moreover, through the FMLA statutory enforcement provision, 29 U.S.C. § 2617(b), Congress specifically directs the DOL to resolve FMLA complaints in the same manner it resolves complaints under the FLSA – pursuant to 29 U.S.C. § 216.[7]

Additionally, this Court's rationale in *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697 (1945) – the

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wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefore under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 215(a)(3) of this title. 29 U.S.C. § 216(b).

[7] The FMLA statutory enforcement provision section 2617(b)(1) provides that "[t]he Secretary shall receive, investigate, and attempt to resolve complaints of violations of section 2615 of this title in the same manner that the Secretary receives, investigates, and attempts to resolve complaints of violations of sections 206 and 207 of this title." FLSA sections 206 and 207 are investigated and resolve pursuant to section 216. 29 U.S.C. § 216(a)-(b).

case in which this Court created a judicial prohibition against waivers of an employee's rights under the FLSA – also supports the conclusion that the phrase "waiver of rights" as used in the FMLA regulation includes retrospective waivers and includes right of actions.

Brooklyn involved the claims of workers who were not paid their wages in a timely manner as required by the FLSA. The specific issue addressed by the Court with respect to two of the consolidated cases was "whether an employee subject to the terms of the [FLSA] can waive or release his right to receive from his employer liquidated damages under Section 16(b)." *Id.* at 699. In one case the employee signed a "release of all of his rights under [FLSA]." *Id.* at 700. In the second consolidated case involving the waiver issue, the employee signed a "general release of all claims." *Id.* at 701-02. After stating the general proposition that "a statutory right conferred on a private party, but affecting the public interest, may not be waived or released if such waiver or release contravenes the statutory policy," *id.* at 704, this Court concluded that the "attempted release and waiver of rights under the Act [through the signing of the release] was absolutely void." *Id.* at 714. This Court recognized that by having the employees execute a release, the employer was attempting to effectuate a waiver of the employee's rights under the FLSA. Like the present case, *Brooklyn* involved both a retrospective waiver and a waiver of the right to file suit.

The same policy reasons that supported the employers in *Brooklyn* not being able to avoid their

obligations and responsibilities under the FLSA, support the Fourth Circuit's conclusion that (relying on the plain meaning of 825.220(d)) Petitioner in this case will not be able to avoid its obligations and responsibilities under the FMLA.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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